Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Ninth Circuit erred in relying on generalized and abstract concerns about unequal bargaining power in the employment context to hold an arbitration agreement unenforceable under the Federal Arbitration Act.

2. Whether the Ninth Circuit erred in holding, contrary to the decisions of this Court in *Perry v. Thomas*, 482 U.S. 483 (1987) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and decisions of other lower courts, that a state law unconscionability rule may be applied in an arbitration-specific manner in order to invalidate an arbitration agreement under the Federal Arbitration Act.

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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CIRCUIT CITY STORES, INC.,
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SAINT CLAIR ADAMS,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Ninth Circuit (App. 1a-10a) is reported at 279 F.3d 889 (9th Cir. 2002).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000), provides in pertinent part:

> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> *§ 3* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
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> *§ 4* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The

> court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

Id. §§ 2 – 4.

STATEMENT OF THE CASE

A. Statutory Background.

The Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. §§ 1-16, was enacted in 1925 in order to overcome long-standing judicial reluctance to enforce arbitration agreements. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995). The "preeminent concern" behind the FAA was to "enforce private [arbitration] agreements into which parties had entered." *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (internal quotation omitted). Accordingly, § 2, the major substantive provision of the Act, requires that courts enforce arbitration agreements just as they would any other contract. *Allied-Bruce*, 513 U.S. at 273. Sections 3 and 4 of the FAA allow federal district courts to compel arbitration by staying federal and state court proceedings that are initiated by a party to an arbitration agreement.

The effect of these provisions is to establish a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It follows, the Court held in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA preempts any state law that would "undercut the enforceability of arbitration agreements." *Id.* at 11-12, 16. In short, the FAA creates a "body of federal substantive law of arbitrability," *Moses H. Cone*, 460 U.S. at 24, that leaves states without the authority to apply their own rules against enforce-

ment of arbitration agreements. *See Allied-Bruce*, 513 U.S. at 271-72 (describing and reaffirming *Southland*).

Finally, and importantly for this case, the Court has made clear that FAA's "liberal federal policy favoring arbitration" applies fully in the employment context. In cases like *Perry* and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court has held that mandatory, pre-dispute agreements by employees to arbitrate employment-related causes of action, including statutory claims, are to be "rigorously enforced" under the FAA. *Perry*, 482 U.S. at 490. Nothing about arbitration, the Court explained in *Gilmer*, makes it an inherently inferior method of protecting employees' legal rights. On the contrary, arbitration offers all parties – employees as well as employers – significant advantages over litigation, including "simplicity, informality, and expedition." 500 U.S. at 31. Generalized attacks on arbitration of employment disputes, the Court concluded,

> rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Id. at 30 (internal quotations omitted).

B. Factual Background.

In March 1995, Circuit City implemented an Associate Issue Resolution Program ("AIRP") providing for binding arbitration of employment-related legal disputes. Persons employed by Circuit City at that time were given the choice of either participating in the AIRP or "opting-out." Following implementation of the AIRP, new applicants, like respondent, were required as part of the application process to sign the "Circuit City Dispute Resolution Agreement" ("DRA"), which requires all applicants and current and for-

mer employees to submit any employment-related legal dispute to binding arbitration. App. 2a.

The DRA incorporates a set of "Dispute Resolution Rules and Procedures," which establish the basic rules governing the conduct of arbitrations under the DRA. The rules emphasize that the outcome of the arbitration is final and binding on both the employee and Circuit City. The rules also contemplate that, subject to re-allocation by the arbitrator, each party will bear one-half of the fees and costs of arbitration. Employees, however, may limit their liability for any fees and costs to three percent (3%) of their most recent annual income. Employees also can be relieved of paying any share of the fees and costs if they prevail.[1]

C. Prior Proceedings and Decision Below.

In November 1997, respondent, notwithstanding his agreement to submit any employment-related legal disputes to arbitration, filed a lawsuit against Circuit City in a California Superior Court alleging various forms of employment discrimination and related claims under state law. Circuit City, invoking §§ 3 and 4 of the FAA, 9 U.S.C. §§ 3-4, filed a petition in the United States District Court for the Northern District of California to stay the state court proceedings and to compel arbitration of respondent's claims. The district court granted Circuit City's petition and entered an order staying the state court proceedings and compelling arbitration.

1. a. The Ninth Circuit reversed. In *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999) (per curiam), the court found that § 1 of the FAA – which excludes from the Act's coverage "contracts of employment of seamen, railroad em-

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[1] The text of the entire DRA and Dispute Resolution Rules and Procedures are reprinted in the original and supplemental joint appendix to *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379).

ployees, or any other class of workers engaged in foreign and interstate commerce," 9 U.S.C. § 1 – rendered the FAA inapplicable to *all* contracts of employment. Because the DRA was part of respondent's employment contract, the court held, the FAA failed to provide a basis for enforcing the DRA's arbitration requirement.

b. This Court reversed the Ninth Circuit. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) ("*Circuit City I*"), this Court held that the exclusion in § 1 of the FAA does not – as the Ninth Circuit had erroneously concluded – exempt *all* contracts of employment from the Act's coverage. Instead, the exclusion exempts only the employment contracts of transportation workers. *See id.* at 119. In all other circumstances, an employee's agreement to submit his or her claims to binding arbitration is fully subject to enforcement under the FAA. *Id.*

In refusing to find all employment contracts outside the reach of the FAA, the Court expressly "reject[ed] the supposition that the advantages of . . . arbitration somehow disappear when transferred to the employment context." *Id.* at 123. In fact, the Court observed, the benefits of arbitration "may be of particular importance in employment litigation." *Id.* Exempting all contracts of employment from the FAA, the Court explained, "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it." *Id.* (internal quotation marks omitted). Because the FAA generally applies to employment contracts, and because respondent does not fall within the narrow exception for transportation workers, the Court reversed the Ninth Circuit and remanded for further proceedings consistent with its opinion. *Id.* at 124.

2. On remand, the Ninth Circuit again denied enforcement under the FAA of respondent's agreement to submit his

employment-related claims to arbitration. This time, the court pinned its decision on § 2 of the FAA, which makes arbitration agreements "valid, irrevocable, and enforceable" but also allows for non-enforcement on "such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Applying this § 2 "savings clause," the Ninth Circuit determined that the DRA is unenforceable on one "such ground" – that it is "unconscionable" as a matter of California state law.

The court began by explaining that, "[u]nder California law, a contract is unenforceable if it is both procedurally and substantively unconscionable." App. 4a. According to the Ninth Circuit, procedural unconscionability turns principally on "the equilibrium of bargaining power between the parties," while substantive unconscionability turns on an assessment of "whether the terms of the contract are unduly harsh or oppressive." *Id.* In applying these standards, the court turned for guidance to the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), which held an employment arbitration agreement unconscionable under California law.

The Ninth Circuit first concluded, relying on *Armendariz*, that the DRA is procedurally unconscionable. App. 5a. The sole basis articulated for that holding is that the DRA is a "contract of adhesion . . . drafted by the party with superior bargaining power," in that Circuit City "possesses considerably more bargaining power than nearly all of its employees or applicants," "few [of whom] are in a position to refuse a job because of an arbitration agreement." *Id.* (citing *Armendariz*, 6 P.3d at 690).

The court went on to hold, again relying on *Armendariz*, that the DRA is substantively unconscionable as well. First, the Ninth Circuit concluded, the DRA fails to satisfy the "modicum of bilaterality" purportedly required by California

law for the enforcement of arbitration agreements in the employment context. *Id.* at 6a. Although the DRA is "bilateral" in the sense that both parties – Circuit City and its employees – are bound by the outcome of arbitration, the Ninth Circuit found that the DRA is "one-sided" in a different sense, *i.e.*, that it requires employees to arbitrate their claims against Circuit City but does not require Circuit City to arbitrate any claims it might have against an employee. *Id.*[2] Second, the Ninth Circuit focused on the DRA's cost-sharing provision, and held that any requirement that an employee share in an arbitrator's fees is substantively unconscionable. *Id.* at 7a.

After finding the DRA unconscionable as a matter of California law, the court stated that its decision also was "entirely consistent with federal law concerning the enforceability of arbitration agreements." *Id.* at 8a. Addressing the question of federal preemption only briefly, the Ninth Circuit concluded that its invalidation of the DRA was consistent with the FAA under the §2 savings clause: "Nor does our decision run afoul of the FAA by imposing a heightened burden on arbitration agreements," the court reasoned, "[b]ecause unconscionability is a defense to contracts generally and does not single out arbitration agreements for special treatment." *Id.* at 9a.

Finally, the court addressed whether the provisions of the DRA it deemed unenforceable could be severed. The court concluded that they could not. "[T]he objectionable provi-

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[2] That "asymmetry," the Ninth Circuit added, was "compounded" by the agreement's failure to allow recovery in arbitration of the full range of remedies available to a claimant in court. App. 6a-7a. The Ninth Circuit included this factor in its analysis, if only in a supporting role, despite the fact that Circuit City advised the court that it no longer sought to enforce the limitations on remedies in this case or in any other arbitration. *See id.* at 7a n.3.

sions pervade the entire contract," the court determined, in that "the unilateral aspect of the DRA runs throughout the agreement and defines the scope of matters that are covered." *Id.* at 10a. In the Ninth Circuit's view, there was no way to eliminate the objectionably "unilateral" nature of the DRA by excising particular provisions, and as such, "the entire arbitration agreement [was] unenforceable." *Id.*

REASONS FOR GRANTING THE WRIT

This is the second time the Ninth Circuit has declined to enforce the same arbitration agreement between Circuit City and respondent. In *Circuit City I*, this Court reversed the Ninth Circuit's first effort, rejecting the position that employment arbitration agreements as a class are unenforceable under the FAA. Now, the Ninth Circuit has once again deemed the agreement unenforceable, largely on the basis of what appears to be a continued presumption that pre-employment arbitration agreements are unfair to employees. This new rationale is no more persuasive than the prior rationale rejected by this Court. The Court's review is once more required to ensure that the pro-arbitration mandate of the FAA is given full effect by the court below.

The Ninth Circuit's conclusion that the DRA is unconscionable and unenforceable under California law rests on three grounds: (1) that Circuit City "possesses considerably more bargaining power than nearly all of its employees," App. 5a; (2) that the DRA is "substantively unconscionable" in requiring employees but not employers to arbitrate employment-related claims and in requiring employees potentially to pay a share of the costs of arbitration, *id.* at 6a; and (3) that the DRA fails to allow recovery of the full range of remedies available in a judicial forum, *id.* at 8a. The Ninth Circuit's reliance on the first two of those considerations is inconsistent with the FAA's "liberal federal policy in favor of arbitration," and it is decidedly out of step with decisions of this Court and other courts. *See* Parts I & II, *infra*.

As for the limitations on available remedies, Circuit City advised the Ninth Circuit that the DRA has long since been revised, and Circuit City no longer seeks to enforce any such limits in this or any other arbitration. App. 7a n.3. Circuit City does not here challenge the Ninth Circuit's analysis of these now-dormant provisions. Even assuming that the remedies limitations are unconscionable under California law, however, the decision below could not stand on that basis alone. Once the factors on which the Ninth Circuit incorrectly relied – i.e., unequal bargaining power, lack of mutuality, and cost-sharing – are stricken, the limit on remedies would be severed under the Ninth Circuit's own analysis because it does not "run[] throughout the agreement." *Id.* at 10a. As a result, the basic requirement to submit employment-related legal disputes to arbitration would be enforced. *Cf. Circuit City Stores, Inc. v. Gannon*, 262 F.3d 677 (8th Cir. 2001) (severing limitation on recovery of punitive damages in Circuit City DRA and enforcing obligation to arbitrate claims).

I. THE NINTH CIRCUIT'S HEAVY RELIANCE ON UNEQUAL BARGAINING POWER CONFLICTS WITH *GILMER* AND UNDERMINES *CIRCUIT CITY I.*

In finding the DRA unenforceable on state law grounds of unconscionability, the Ninth Circuit placed dispositive weight on a presumed disparity in bargaining power between Circuit City and its employees. In particular, the court's sole basis for concluding that the DRA is procedurally unconscionable was that the agreement was "drafted by the party with superior bargaining power and relegates to" employees and applicants "the option of either adhering to its terms . . . or rejecting the contract entirely." App. 5a. The court's analysis of substantive unconscionability under California law likewise turns in significant part on the parties' relative bargaining power. *See id.* at 5a-6a; *Armendariz*, 6 P.3d at

692 (finding that "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee . . . but not to accept such limitations when it seeks to prosecute a claim against the employee"); *id.* at 687 ("when an employer imposes mandatory arbitration as a condition of employment" the arbitration agreement may not include a fee-sharing provision).

The Ninth Circuit's heavy reliance on generalized concerns about unequal bargaining power cannot be reconciled with this Court's decisions. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court squarely rejected the argument that agreements to arbitrate employment claims are unenforceable under the FAA because "there often will be unequal bargaining power between employers and employees." *Id.* at 33. "Mere inequality in bargaining power," the Court made clear, "is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* Instead, a "claim of unequal bargaining power is best left for resolution in specific cases," based on a fact-specific inquiry into whether the employee was "coerced or defrauded into agreeing to the arbitration clause." *Id.*

The substantial weight attached by the Ninth Circuit to abstract concerns about unequal bargaining power – without any case-specific analysis of economic coercion or fraud – is contrary to the clear instruction of *Gilmer*. It is also irreconcilable with this Court's prior decision in this very case. In *Circuit City I*, respondent asserted that "the perceived disparity in bargaining power between worker and employer" supported its position that all employment contracts fall outside the reach of the FAA. Brief for Respondent, *Circuit City Stores, Inc. v. Adams* (No. 99-1379), at 38-39, 44-45 (2001). Both dissenting opinions in *Circuit City I* adopted the same view, concluding that Congress intended to exempt all contracts of employment from the FAA's coverage because of "the potential disparity in bargaining power between indi-

vidual employees and large employers," *Circuit City I*, 532 U.S. at 132 (Stevens, J., dissenting); *see id.* at 138-39 & n.3 (Souter, J., dissenting). But this Court rejected that position, finding that the FAA covers all employment contracts except those of transportation workers.

The opinion below effectively undermines this Court's decision in *Circuit City I*. By placing dispositive weight on generalized concerns about the disparity in bargaining power between employers and employees – entirely apart from any showing of coercion or misconduct in these particular circumstances – the opinion below creates a heavy presumption that *all* employment arbitration agreements are unconscionable. Nearly all employment arbitration agreements are entered into on a non-negotiable basis (as, for instance, were the employment arbitration agreements approved by this Court in *Gilmer* and *Perry*). If requiring an arbitration agreement as a condition of employment is enough to make that agreement unconscionable, the effect is to create something very much like a general employment exemption to the FAA – precisely the exemption rejected by this Court in this very case.

In view of *Gilmer* and *Circuit City I*, it is not surprising that the opinion below is out of step with decisions from other federal appellate courts. *See Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 367 (7th Cir. 1999) (explaining that *Gilmer* "specifically reject[s] the argument that the Form U-4 creates an unconscionable contract of adhesion because of the unequal bargaining power between the plaintiff and his employer," and that an arbitration agreement "is not unenforceable on the grounds that it is an unconscionable contract of adhesion" absent a "showing of fraud, misconduct, or wrongdoing"); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17 (1st Cir. 1999) (recognizing *Gilmer*'s holding that "disparity of bargaining power" does not suffice to render an arbitration agreement unenforceable,

and that there must be a "showing of fraud or oppressive conduct"). The Ninth Circuit's conclusion that unequal bargaining power is tantamount to "procedural unconscionability" is contrary to this Court's decisions and those of other federal appellate courts, and warrants this Court's review.

II. THE NINTH CIRCUIT'S HOLDING THAT THE FAA DOES NOT PREEMPT ARBITRATION-SPECIFIC STATE LAW RULES OF UNCONSCIONABILITY IS INCORRECT AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS.

In the decision below, the Ninth Circuit relied on two rules of California law to hold that the Circuit City DRA is unconscionable and hence unenforceable. First, the court applied the rule, established in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 692-93 (Cal. 2000), that an arbitration agreement is substantively unconscionable where it is imposed as a condition of employment and fails to provide a "modicum of bilaterality" – that is, where it obligates the employee but not the employer to arbitrate employment-related disputes. *See* App. 5a-6a. Second, and again invoking *Armendariz*, the court applied the rule that any provision for employee "fee-sharing" renders an arbitration agreement unconscionable. *See id.* at 7a; *see also Armendariz*, 6 P.3d at 685-89.

Whether the Ninth Circuit correctly construed California law, of course, presents no federal issue for this Court to decide. What is a federal question – and one of great importance – is whether state law, so construed, is preempted by the FAA. Contrary to the holding of the Ninth Circuit, *see* App. 9a, the FAA does indeed preempt state-law unconscionability rules that prohibit enforcement of any employment arbitration agreement that is "unilateral" or includes a fee-sharing provision.

A. Under The Standard Announced In This Court's Cases, The State-Law Unconscionability Rules Applied By The Ninth Circuit Are Preempted By The FAA.

1. Section 2 of the FAA generally mandates the enforcement of arbitration agreements regardless of state law to the contrary. *See, e.g., Allied-Bruce*, 513 U.S. at 271-72. Accordingly, the Ninth Circuit could invalidate the DRA under state unconscionability law only by relying on § 2's "savings clause," which provides that arbitration agreements may be deemed unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *See* App. 9a. But as this Court's precedents make clear, a state-law rule that is keyed specifically to the arbitration context falls outside the savings clause of § 2 and therefore is preempted by the FAA.

In *Perry v. Thomas*, the Court considered precisely the question raised here: how to resolve the "choice-of-law issue" that arises when state unconscionability law is asserted as a bar to enforcement of an arbitration agreement under the FAA. 482 U.S. at 492-93 n.9. Naturally enough, the Court turned to the "text of § 2" as the "touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage" of the FAA. *Id.* As the Court read the relevant language, a state unconscionability rule *may* be given force under the savings clause – but only if that rule "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* By contrast, a state-law unconscionability rule that "takes its meaning precisely from the fact that a contract to arbitrate is at issue" does not qualify as a general principle under the savings clause and instead is preempted by the federal rule of enforceability found in § 2 of the FAA. *Id.*

The Court reaffirmed this understanding of § 2 and its savings clause in *Doctor's Associates, Inc. v. Casarotto*, 517

U.S. 681 (1996), holding that a state-law notice provision for arbitration agreements is preempted by the FAA. In reaching this conclusion, the Court specifically rejected the argument that the notice requirement came within the scope of the savings clause because it could be phrased in arbitration-neutral terms, as "but one illustration of a cross-the-board rule" against adhesion contracts. *Id.* at 687 n.3. The mere invocation of a state unconscionability doctrine, in other words, is not enough to trigger the savings clause of § 2. "[A] court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Id.* (quoting *Perry*, 482 U.S. at 493 n.9).

2. The decision below cannot be squared with this Court's construction of § 2 in *Perry* and *Doctor's Associates*. In deciding that the rules articulated in *Armendariz* on mutuality and fee-sharing are saved from preemption under § 2, the Ninth Circuit appears to have taken the view that *any* application of a state law unconscionability doctrine necessarily falls within the savings clause. The entirety of the court's reasoning is that "[b]ecause unconscionability is a defense to contracts generally . . . it is also a valid reason not to enforce an arbitration agreement under the FAA." App. 9a. But *Perry* and *Doctor's Associates* make perfectly clear that *some* applications of state unconscionability law are sufficiently arbitration-specific to trigger preemption by the FAA. Indeed, the standard carefully laid out by the Court in *Perry* and *Doctor's Associates* is designed to identify precisely *which* applications of state unconscionability law are preempted and which are not. The Ninth Circuit entirely ignores this established law and fails to engage even perfunctorily in the inquiry mandated by *Perry* and *Doctor's Associates*.

Once the proper standard is applied, it becomes plain that

the unconscionability doctrine relied on by the Ninth Circuit to invalidate the DRA is preempted under § 2. The first principle that the Ninth Circuit derives from *Armendariz* and then applies to invalidate the DRA is this: a unilateral arbitration agreement imposed on an employee as a condition of employment is unconscionable and unenforceable under California law. App. 5a-6a. That principle is arbitration-specific on its face. A rule that preemployment arbitration agreements must include mutuality of obligation does not apply to contracts generally. By its own terms, such a rule is limited to the arbitration context.[3] The second *Armendariz* principle – that an employee may not be required to pay a portion of the arbitrator's fees – fares no better. Again, a rule that arbitration agreements may not require the sharing of arbitrators' fees by definition has no application outside the arbitration context. In the words of *Perry*, the state-law principles applied by the Ninth Circuit below "take [their] meaning precisely from the fact that a contract to arbitrate is at issue," 482 U.S. at 493 n.9, and are therefore preempted by the FAA.[4]

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[3] California law confirms this common-sense reading. In general, outside of the arbitration context, California contract law does *not* require mutuality of obligation as a pre-condition for the enforcement of a contract. *See, e.g., Prudential Ins. Corp. v. Vars*, 77 Cal. Rptr. 2d 479, 490 (Ct. App. 1998) (mortgage agreement provision enforceable despite unilateral nature; "Where sufficient consideration is present, mutuality is not essential."); *Hillsman v. Sutter Cmty. Hosp. of Sacramento*, 200 Cal. Rptr. 605, 611 (Ct. App. 1984) (employment contract enforceable despite unilateral nature; "If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged, or 'mutuality of obligation.'") (citations and internal quotations omitted).

[4] Once preemption is established, of course, it follows that the pro-arbitration mandate of the FAA governs. Under the FAA, there is no question but that the DRA is enforceable. Respondent does not even suggest that the FAA makes an exception to its enforcement rule for arbitration agreements that are "unilateral" in the sense described by the

The arbitration-specific nature of the *Armendariz* principles applied below is reinforced by an analysis of the *Armendariz* decision itself. *Armendariz* self-consciously purports to establish a set of minimum requirements for the enforcement of *arbitration* agreements under California law. 6 P.3d at 674 (listing "certain minimum requirements" for arbitration). At every step of its analysis, *Armendariz* returns to what the California court takes to be uniquely unfavorable features of preemployment arbitration agreements. *Id.* at 690 ("in the case of *preemployment arbitration contracts*, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for . . . few employees are in a position to refuse a job because of an *arbitration requirement*") (emphasis added); *id.* at 692 (it would be "unfairly one-sided for an employer with superior bargaining power to impose *arbitration* on the employee as plaintiff but not to accept such limitations" for itself) (emphasis added); *id.* at 686 (requiring employer to pay all arbitration fees "because [arbitration] has been mandated by the employer *as a condition of employment*") (emphasis added). *Armendariz* establishes arbitration-specific rules in response to arbitration-specific concerns, and under *Perry* and *Doctor's Associates*, such rules are preempted by the FAA.[5]

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court below. Nor does a fee-sharing provision by itself render an arbitration agreement unenforceable under the FAA. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (rejecting *per se* rule against fee-sharing under FAA); *Circuit City Stores, Inc. v. Ahmed*, __ F.3d __ , 2002 WL 441528 (9th Cir. Mar. 22, 2002) (enforcing DRA with fee-sharing provision under FAA).

[5] Circuit City is not, of course, asking this Court to review *Armendariz* or the California law established by that case. The only issue before this Court is the *application* of that state law by the court below to invalidate an arbitration agreement, and whether that application of state law is consistent with the FAA.

B. The Ninth Circuit's Preemption Holding Conflicts With Decisions Of Other Courts.

1. The Ninth Circuit's holding that § 2 allows for application of *Armendariz*'s "mutuality" rule conflicts directly with the decision of the Alabama Supreme Court in *McNaughton v. United Health Care Servs.*, 728 So. 2d 592 (Ala. 1998).[6] At issue in *McNaughton* is precisely the same choice-of-law question facing the Ninth Circuit below: whether a state law unconscionability principle that requires mutuality of obligation in preemployment arbitration agreements is preempted by the FAA. *Id.* at 597-98. According to *McNaughton*, the answer is "yes." Such a state-law rule "directly depends on arbitration for its application" and "relies on the uniqueness of the concept of arbitration under [state] law to support the doctrine." *Id.* at 597-98. It follows that application of that rule to invalidate an arbitration agreement "flies in the face of *Doctor's Associates*" and is preempted under the FAA. *Id.* at 598.

With respect to mutuality, the holding below also conflicts with the decision of the Third Circuit in *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (1999). Though *Harris* arises outside the employment context, it is otherwise on all fours with the instant case and with *McNaughton*. The question addressed in *Harris* is whether state unconscionability principles may be applied to preclude enforcement of an arbitration agreement because it lacks mutuality. *Id.* at 179-84; *see id.* at 183 ("According to the Harrises, the arbitration clause is substantively unconscionable because it allows Green Tree the option of litigating disputes, while it provides no such choice to them.") Like the Alabama Supreme Court, the Third Circuit concludes that those state-law principles may not be applied consistent with *Doctor's Asso-*

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[6] *See* Sup. Ct. Rule 10(b) (conflict with state court of last resort as grounds for granting certiorari).

ciates. *Id.* at 182-83. Instead, the Third Circuit holds as a matter of federal law that the arbitration agreement is enforceable despite a lack of mutuality. *Id.* at 180, 182.

2. As to both mutuality and fee-splitting, the Ninth Circuit's application of *Armendariz* is inconsistent with the approach taken by several other federal circuits to preemption under § 2. These circuits read *Perry* and *Doctor's Associates* as establishing a rule that a state-law principle is "generally applicable" within the meaning of the savings clause only if the principle applies to any and every contract. A rule that applies only to some subclass of contracts, on the other hand, is not "generally applicable" under § 2's savings clause and hence is preempted by the FAA. Thus, both the First and Second Circuits have held that state statutes governing forum selection in franchise agreements, but not other contracts, are preempted by the FAA as applied to arbitration agreements. *See KKW Enter. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51 (1st Cir. 1999) (because state statute limited to franchise agreements "does not apply to *any* contract" it is not "generally applicable" and is therefore preempted by FAA) (emphasis in original); *Doctor's Assocs. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same). On the same reasoning, the Fifth Circuit has concluded that a state statute governing forum selection in construction contracts, but not other contracts, falls outside § 2's savings clause. *OPE Int'l LP v. Chet Morrison Contractors*, 258 F.3d 443, 447 (5th Cir. 2001).

The difference in standards applied by the Ninth Circuit, on the one hand, and the First, Second, and Fifth Circuits, on the other, is more than semantic, and this case illustrates the point. Whatever their other properties, there can be no real question but that the *Armendariz* principles relied on by the Ninth Circuit below are limited to the employment context. *See* App. 6a (California law requires "modicum of bilaterality" when arbitration agreement "forces *employees* to arbi-

trate claims against the *employer*") (emphasis added); *id.* at 8a ("unlawful to require an *employee*, through a mandatory arbitration agreement, to share the costs of arbitration") (emphasis added). Under the approach to § 2 preemption adopted by the First, Second and Fifth Circuits, those employment-specific standards alone would be enough to preempt the *Armendariz* rules. The Ninth Circuit's approach thus stands in clear conflict to the approach adopted by the First, Second and Fifth Circuits, and warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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